United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

77-1147

TO BE ARGUED BY
HAROLD BAER, JR.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

- x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee,, : Docket No. 77-1147

-against- :

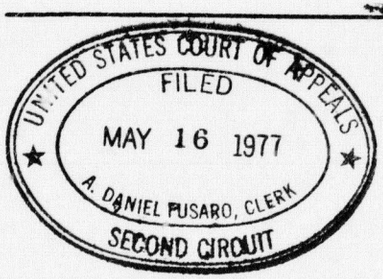
JOHN YARMOSH, et al.,

Defendants-Appellants. :

- x

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR DEFENDANT-APPELLANT JOHN YARMOSH



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UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Plaintiff-Appellee, -against- JOHN YARMOSH, et al., Defendants-Appellants.	Docket No. 77-1147 PARAGRAPH TO BE INSERTED IN BRIEF ON BEHALF OF DEFENDANT-APPELLANT JOHN YARMOSH

It is respectfully requested that the following paragraph, inadvertently omitted from the brief on behalf of Yarmosh, be inserted on p. 17 thereof, just before the paragraph beginning with the words "If the resentencing":

> "It is respectfully requested that in the interests of justice, the pre-sentence report prepared by the Probation Department concerning Yarmosh be made part of the record on appeal. United States v. Robin, 545 F.2d 775, 778 (2d Cir. 1976); F.R.A.P. Rule 10. If any doubt remains with respect to the judge's reliance on convictions which never occurred, we submit that a hearing then be held so that the nature of Yarmosh's criminal record may be properly brought to the attention of this Court."

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STATEMENT OF ISSUES

1. Did Judge Weinfeld abuse his discretion in denying Yarmosh leave to move to suppress as evidence the tape of the conversation in which Yarmosh had allegedly participated?

2. Did the procedures followed by Judge Weinfeld in sentencing Yarmosh violate due process of law?

PRELIMINARY STATEMENT

Defendant John Yarmosh appeals from a final judgment of conviction rendered against him by District Judge Edward Weinfeld in the case of United States v. Esposito et al., 76 Cr. 1074, on March 14, 1977, in the United States District Court for the Southern District of New York.

In an indictment filed in the Southern District on November 22, 1976, and a superseding indictment filed on January 31, 1977, Yarmosh was ~~indicted~~ charged in two counts: (1) conspiracy, in violation of 18 U.S.C. § 371; and (2) participation in an illegal gambling business, in violation of 18 U.S.C. § 1955. (A-4). He pleaded guilty to the conspiracy count. The substantive count was dismissed on the date of sentencing, March 14, 1977, by consent. (A-40). Yarmosh was sentenced to serve one year and one day in jail. (A-40).

Although he pleaded guilty, Yarmosh had with the consent of the government and the court reserved his right to

appeal from any and all disadvantageous pre-trial rulings. (A-19, 21) See United States v. Burke, 517 F.2d 377, 379 (2d Cir. 1975).

While this brief is limited to a discussion of Yarmosh's appeal from (1) the order denying application on January 26, 1977, for leave to move to suppress the wiretap evidence against him and for a hearing on the issue of suppression, and (2) his sentence, Yarmosh pursuant to F.R.A.P. Rule 28 (i) adopts by reference the arguments of other defendants-appellants who are appealing on other grounds insofar as they are relevant to him.

STATEMENT OF FACTS

On July 13, 1975, at 2:19 P.M., the government intercepted pursuant to a federal wiretap order a conversation in which John Yarmosh allegedly participated. (A-13) The order, signed by The Honorable Robert L. Carter on July 10, 1975, expired on July 31, 1975. (A-13). John Yarmosh was named in neither the order nor the application for the order. He received notice of the interception on or about August 6, 1976. (A-14).

Pursuant to Rule 12 of the Federal Rules of Criminal Procedure ("F.R.Crim.P. 12"), Judge Weinfeld set the cut-off day for Yarmosh to make pre-trial motions for December 21, 1976. Transcript of December 20, 1976, Hearing, p. 118. The trial date was scheduled for February 7, 1977. (A-17). On January 26, 1977, Yarmosh applied to Judge Weinfeld for leave

to move to suppress as evidence the tape of the intercepted conversation. (A-10) The application was based on grounds first enunciated in the January 18, 1977, decision of the United States Supreme Court, in United States v. Donovan, 45 U.S.L.W. 4115 (1977). (A-11). The application was denied. (A-18).

ARGUMENT

POINT I

THE COURT BELOW ABUSED ITS DISCRETION IN DENYING YARMOSH LEAVE TO MOVE TO SUPPRESS AS EVIDENCE THE TAPE OF HIS ALLEGEDLY INTERCEPTED CONVERSATION

While the district court was empowered pursuant to F.R.Crim.P.12 to set a cut-off date for motions, it also had discretion pursuant to this rule to permit Yarmosh to make a motion after that date. F.R.Crim.P. 12 provides in part:

> "(c) Motion Date: Unless otherwise provided by local rule, the court may, at the time of the arraignment or as soon thereafter as practicable, set a time for the making of pretrial motions or requests. . .
>
> * * *
>
> (f) Effect of Failure to Raise Defense or Objections. Failure by a party to raise defenses or objections or to make requests which must be made prior to trial, at the time set by the court pursuant to subdivision (c), or prior to any extension thereof made by the court, shall constitute waiver thereof, but the court for cause shown may grant relief from the waiver." (Emphasis added)

The court may permit the motion to be made where good cause exists for doing so. Since Yarmosh had good cause for moving

when he did, it is respectfully submitted that the court abused its discretion in not permitting the motion.

The cause shown was the decision of the United States Supreme Court in United States v. Donovan, 45 U.S.L.W. 4115 (January 18, 1977). This case was decided after the December 21, 1976, cut-off date set by the judge for motions by Yarmosh but just before Yarmosh applied for leave to move on January 26, 1976. Donovan provided a new ground for Yarmosh to move pursuant to 18 U.S.C. § 2518 (10) to suppress for failure to receive timely inventory notice pursuant to 18 U.S.C §2518(8)(d). Before Donovan, under the decisions of this Circuit, substantial grounds for this motion did not exist.

Under the pre-Donovan Second Circuit decisions, suppression for violation of 18 U.S.C. § 2518(8)(d) was available in only one situation: if a defendant's failure to receive timely notice prejudiced him. In United States v. Rizzo, 492 F.2d 443 (2d Cir. 1974), cert. denied 417 U.S. 944, for instance, the court held that without prejudice to the defendant, the absence of notice did not entitle him to suppression:

> "We believe, as indicated in United States v. Manfredi, at [488 F.2d 588,] 601 that the touchstone to the determination whether to suppress wiretap evidence on a claim of failure of notice should be prejudice to the defendant. [Citation omitted]. Here no claim of actual prejudice has been made, nor do we see how it could be, and thus, we find that the district court did not err in admitting evidence of that one telephone call." Rizzo, supra, 492 F.2d at 447. See also United States v. Principie, 531 F.2d 1132, 1141 (2d Cir. 1976).

Donovan carved out a new basis for suppression which forcefully applies in cases such as Yarmosh's where the defendant is only entitled to notice under 18 U.S.C. §2518(8)(d) in the discretion of the judge who issued the wiretap order. Donovan imposed a new duty on the government to supply certain information to the judge to insure that he can exercise informed discretion. It then stated that violation of this duty might warrant suppression when deliberate.

The fact that a deliberate violation of the notice provisions of 18 U.S.C. §2518(8)(d) may be grounds for suppression stems from the following. In refusing to suppress an intercepted conversation although notice of the interception had not been given to two defendants, Donovan nevertheless clearly warned that a deliberate violation of the notice provisions might warrant suppression. The court stated:

> "We are therefore not called upon to decide whether suppression would be an available remedy if the Government knowingly sought to prevent the District Court from serving inventory notice on particular parties." Donovan, supra, 45 U.S.L.W. at 4122 at n. 26.

It cautioned the Government to adhere strictly to the notice requirements:

> "[W]e reemphasize the suggestion we made in United States v. Chavez, that 'strict adherence by the Government to the provisions of Title III would nonetheless be more in keeping with the responsibilities Congress has imposed upon it when authority to engage in wiretapping or electronic surveillance is sought.' 416 U.S., at 580." Donovan, supra 45 U.S.L.W. at 4122.

Indeed, in his partial dissent, Justice Marshall noted:

"The Court's opinion implies that if the violations of Title III [e.g. of 18 U.S.C. §2518(8)(d)] considered here had been intentional the result would be different. . . . This must be so, for surely the Court would not tolerate the Government's intentional disregard of duties imposed on it by Congress." Donovan, supra, 45 U.S.L.W. at 4125.

Indeed, in Donovan, the court stated several times that the government had only inadvertently violated the notice provisions. It thereby implied that inadvertence was a crucial factor in its decision not to suppress:

"As a result of what the Government labels 'administrative oversight', respondents Merlo and Lauer were not included in either list of names and were never served with inventory notice." Donovan, supra, 45 U.S.L.W. at 4117. (Emphasis supplied)

"Nor was suppression justified with respect to respondents Merlo and Lauer simply because the Government inadvertently omitted their names from the comprehensive list of all identifiable persons whose conversations had been overheard." Donovan, supra, 45 U.S.L.W. at 4122. (Emphasis supplied)

"Counsel for respondents Merlo and Lauer conceded at oral argument that the failure to name those respondents in the proposed inventory order was not intentional..." Donovan, supra, 45 U.S.L.W. at 4122 n. 26. (Emphasis supplied)

A reasoned decision on whether a violation of the notice provisions has been deliberate can only be made after a hearing. Thus the Eighth Circuit Court of Appeals in recognizing that after the Donovan decision, a deliberate violation of the notice requirements of 18 U.S.C. §2518(8)(d) might warrant suppression, awarded defendants claiming a deliberate violation a hearing on that issue.

In United States v. Di Girlomo, Dkt. No. 76-1417 8th Cir., March 1, 1977, the government had failed to supply the judge who issued a federal wiretap order with the names of

three persons whose conversations had been intercepted. The three were not named in the order or application for the order and so were not entitled to mandatory notice under 18 U.S.C. §2518(8)(d). They received discretionary notice, but only after 90 days after the expiration of the wiretap order: after the period in which notice must generally be given pursuant to 18 U.S.C. §2518(8)(d).

The three argued that the omission of their names from the list of names given to the judge had been intentional. The court noted that under Donovan, intentional omission might warrant suppression:

> "The Court [in Donovan] indicated that the question of whether suppression would be an available remedy if the government knowingly sought to prevent the district court from serving notice on particular parties was left undecided." (opinion, p. 5)

It held that in "light of the Donovan decision, the appellees are entitled to a hearing on . . . inadvertence. . ." Id. at p. 5.

The recent case of United States v. Variano, Dkt. No. 76-1335, slip op. 2295 (2d Cir., March 14, 1977), is consistent with the foregoing analysis. In Variano, the Second Circuit affirmed the denial of defendant Evangelista's motion to suppress the tapes of his intercepted conversations, despite a failure to give him inventory notice. Evangelista had had an evidentiary hearing on his motion, but had not shown that the failure to give him notice was deliberate.

At the hearing, the government excused its failure to give him notice by the fact that it could not identify him. At best, Evangelista could show that the failure to give notice was a negligent one: the government should have recognized his voice on the tapes. That is, he did not show that the government actually identified him but still failed to give his name to the judge. Thus the court stated:

> "Moreover, even if, as Evangelista contends, the Government should have recognized his voice on the tapes in question, the failure to give him notice does not require suppression of the tapes." slip op. at 2306. (Emphasis supplied)

Also consistent is United States v. Fury, Dkt. No. 76-1506, slip. op. 3195 (2d Cir., April 27, 1977). In Fury, the appellant moved to suppress wiretap evidence because he failed to receive timely inventory notice. The Second Circuit affirmed the denial of the motion to suppress because the defendant failed to show prejudice. But nowhere does its opinion suggest that the appellant raised the question of a deliberate failure to give timely notice. Nowhere does it state that such a deliberate failure would not warrant suppression.

Equally important as this new ground opened by Donovan was Donovan's articulation of a new duty with which the government must comply: the duty to submit to the court a complete list of all identifiable persons whose conversations have been intercepted:

> "Moreover, where, as here, the Government chooses to supply the issuing judge with a list of all identifiable persons rather than a description of the classes into which those persons fall, the list must be complete. Applying these principles, we find that the Government did not comply adequately with § 2518(8)(d), since the names of respondents Merlo and Lauer were not included on the purportedly complete list of identifiable persons submitted to the issuing judge." Donovan, supra, 45 U.S.L.W. at p. 4121.

No such duty existed in the Second Circuit before Donovan. But even if it had, under the prejudice test, deliberate violation of such would have been irrelevant, unless the defendant could prove prejudice.

Donovan did not consider when the new duty had to be carried out; but under 18 U.S.C. § 2518(8)(d), it clearly had to be performed within 90 days of the date of expiration of the wiretap order. Notice must be given within such time; and unless the names are submitted within 90 days, notice could not be timely given.

Although Donovan did not specifically consider when the government must submit to the judge the names of persons whose voices are identified in intercepted conversations after the 90 days have elapsed, their names should be submitted immediately after identification. Any other interpretation of 18 U.S.C. §2518(8)(d) would be unreasonable and foster inequality, contravening the following well-established rule:

> "'[W]here a particular construction of a statute will occasion great inconvenience or produce inequality and injustice, that view is to be avoided if another and more reasonable interpretation is present in the statute.' Knowlton v. Moore, 178 U.S. 41, 77. . ." West Virginia Pulp & Paper Co. v. McElligott 40 F. Supp. 765,770 (S.D.N.Y. 1941).

The inequality would be fostered between two groups: (1) those fortunate enough to have had their voices identified within 90 days of the expiration of the wiretap - they would have their names furnished to the judge within 90 days; and (2) those unfortunate enough to be so identified after the 90 days - their names would be furnished to the judge whenever the government got around to it.

Unreasonableness would result because the date of receipt of notice would heavily depend on a fortuitous event: the date when the government identified an individual on the tape. Only a requirement for notification immediately upon identification, if identification occurred after the 90-day period, could reduce this unreasonable dependence.

Besides, a rule other than that of immediate notification would permit the Government to usurp the role of the judge. Under 18 U.S.C. §2518(8)(d), the judge has the discretion to determine who should receive notice and can even postpone giving notice for good cause. To the extent the government delays giving the judge the names of persons identified as having been intercepted, the government awards to itself discretion to effect and to postpone notice.

The deliberateness of the government's failure to give Yarmosh's name to the judge for the purpose of deciding whether Yarmosh was entitled to notice - until over a year after his voice had been allegedly intercepted in July 1975 and eight months after he had been allegedly identified before

the grand jury in November 1975 - was not adequately considered by Judge Weinfeld. (A-13) Yarmosh's counsel stressed that the failure was deliberate:

> "[T]his is a willful or at least a knowing failure by the government. . ." (A-12)

But the Judge denied Yarmosh's application for leave to move, focussing only on the issue of prejudice:

> "Moreover, on the representation by the Assistant United States Attorney and taking into account the statement made by attorney representing the defendant, there is no possible basis for any claim of prejudice in this case. The case will proceed to trial." (A-18)

While the absence of prejudice may have been the touchstone before Donovan, however, it is clearly not the sole criterion for suppression now. Without permitting Yarmosh's motion, and an evidentiary hearing in connection with it to determine (1) when Yarmosh was first identified on the tape, and (2) whether the government deliberately delayed too long after identifying him before furnishing his name to the judge, the court plainly abused its discretion.

Finally, the change in the law effected by Donovan unquestionably warranted granting permission to make the motion. This is precisely the kind of cause for which discretion is provided in F.R.C m.P.12(f) permits the judge to hear a motion after the cut-off date set for motions. In point is United States v. Reynolds, 300 F. Supp. 503 (D.D.C. 1969). There, the court refused to permit a defendant to make a motion after the cut-off date, noting that defendant was not relying on newly-created law:

"The information, both factual and legal, on which the April 28, 1969, motion was based was at all times available to defendants and yet they failed to take appropriate action at the time they filed their first motion to dismiss." 300 F. Supp. at. 506. (Emphasis supplied)

"Thus the applicable legal principles were equally 'notorious and available' to defendants [before the cut-off date]." Id.

The court clearly implied that if the defendant had been relying on a change in the law as the basis for his motion, it would have permitted the motion to be made.

The apparent aims of F. R. Crim. P. 12 to limit calendar congestion and ensure speedy trials are commendable. The achievement of such aims, however, must not be responsible for a "rush to judgment": for stampeding courts to deprive defendants of important rights. In view of the foregoing, we respectfully submit that the court's refusal to consider the motion to suppress and hold a hearing was such a deprivation; and that it was an abuse of discretion sufficient to require reversal of Yarmosh's conviction.

POINT II

THE PROCEDURES SURROUNDING HIS SENTENCING DEPRIVED YARMOSH OF DUE PROCESS OF LAW

It is well-established that an appellate court has the power to review the imposition of sentence, where the procedures used in sentencing violate due process of law:

"Appellate courts . . . have power to review . . . a claim that a sentence is the product of procedures

> inconsistent with due process of law. Townsend v. Burke, supra. [334 US 736 (1947]. The test for determining whether challenged procedures satisfy or deny due process has been phrased in many ways. The questions to be answered here are whether the sentencing process conformed with 'fundamental principles of liberty and justice which lie at the base of all our civil and political institutions'..., whether it was infected with fundamental defects resulting in a miscarriage of justice, and whether it was consistent with the rudimentary demands of fair procedures. [Citations omitted]." United States v. Malcolm, 432 F.2d 809, 815 (2d Cir. 1970).

A classic violation of due process occurs when the sentencing judge considers as a basis for sentencing false information about the defendant's criminal record:

> "Misinformation or misunderstanding that is materially untrue regarding a prior criminal record, or material false assumptions as to any facts relevant to sentencing, renders the entire sentencing procedure invalid as a violation of due process." Malcolm, supra, 432 F.2d at 816.

For instance, in the leading case of Townsend v. Burke, 334 US 736 (1947), the Supreme Court reversed a conviction where the sentencing judge misconstrued the defendant's record. The court adverted at the sentencing to various convictions of the defendant, although the defendant had in fact been found not guilty of the charges on which the judge thought he had been convicted:

> "It savors of foul play or of carelessness when we find from the record that, on two others [i.e., for a total of three] of the charges which the court recited against the defendant, he had also been found not guilty. . . . We are not at liberty to assume that items given such emphasis by the sentencing court did not influence the sentence which the prisoner is now serving.

> . . . [T]his prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue. Such a result, whether caused by carelessness or design, is inconsistent with due process of law, and such a conviction cannot stand." Townsend v. Burke, supra, 334 U.S. at 740-1. See also United States v. Robin, 545 F.2d 775, 779 (2d Cir. 1976) ("Where there is a possibility that sentence was imposed on the basis of false information or false assumptions concerning the defendant, an appeal will lie to this Court and the sentence will be vacated.")

It is respectfully submitted that the sentencing of Yarmosh suffered from some of the same fatal defects. The judge at the sentencing made the following erroneous statement about Yarmosh's record:

> "THE COURT: Mr. Yarmosh, my records indicate, and you have seen the probation report, there are five - not five but six - convictions of bookmaking and related activity in bookmaking on the records." (A-38, 39)

He then stated that he imposed a substantial sentence of a year and one day because Yarmosh was a "chronic violator in this area of the law [i.e. bookmaking]." (A-39)

Indeed, the severity of all the sentences turned on the presence of past bookmaking convictions. The judge's theme was as follows: if you were convicted of bookmaking violations before, you must go to jail now. He thus stated at the sentencing:

> "As I said to one of the lawyers, and I looked at the number of arrests and number of convictions and the light sentences that were imposed, there couldn't be any deterrent for it. It almost seems that the fines imposed were a license to go out and continue in their activity.

> As I also mentioned it got to be a revolving door process where some of the defendants were just walking out and engaging in their activity and coming back again." (A-36)

Although Yarmosh had been previously arrested on charges of bookmaking, he had not a single conviction for bookmaking or activity related to bookmaking. In five of the six instances alluded to by Judge Weinfeld, Yarmosh pleaded guilty, and was convicted for and only for disorderly conduct.

By pleading guilty to disorderly conduct, Yarmosh neither admitted participation in bookmaking nor was such participation proved. Acceptance by the court of a guilty plea to disorderly conduct may even indicate that a conviction of bookmaking could not have been obtained. Thus in People v. Griffin, 7 N.Y.2d 511, 515-516, 199 N.Y.S.2d 674 (1960), the New York Court of Appeals* stated where a defendant had pleaded guilty to a lesser included offense:

> "Here, however, appellant did not plead guilty to any count in this indictment. His plea was to a lesser crime which the court is authorized to accept on recommendation of the prosecuting officer (Code Crim. Pro., §342-a). . . .
>
> Where that occurs, the defendant does not admit the facts charged against him in the indictment. He pleads guilty to something else. . . . Such a plea does not presuppose the truth of the facts pleaded in the indictment. . . . His plea only admits the facts stated in the plea as constituting the lesser crime. . . .

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* All five of Yarmosh's convictions for disorderly conduct, were obtained in New York State courts.

> . . . Moreover, the practice of accepting pleas to lesser crimes is generally intended as a compromise in situations where conviction is uncertain of the crime charged. The judgment entered on the plea in such situations may be based upon no objective state of facts. It is often a hypothetical crime and the procedure - authorized by statute - is justified for the reason that it is in substitution for a charge of crime of a more serious nature which has been charged but perhaps cannot be proved." (Emphasis supplied)

In summary, in sentencing Yarmosh, Judge Weinfeld treated five bookmaking arrests as bookmaking convictions. This clearly deprived Yarmosh of due process of law:

> "[A]n 'arrest' cannot validly be treated as a 'conviction' for sentencing purposes. To do so would contravene due process of law. Townsend v. Burke, 334 U.S. 736, 68 S.Ct. 1252, 92 L.Ed. 1690 (1948). See, Note, Procedural Due Process at Judicial Sentencing For Felony, 81 Harv.L.Rev. 821 (1968)." United States v. Rao, 296 F.Supp. 1145, 1148 (S.D.N.Y. 1969)

A sixth conviction relied on by Judge Weinfeld occurred in 1961. Judge Weinfeld described it as follows:

> "The first one [i.e., bookmaking conviction], back in 1961, $1000 fine. I don't know whether the fine was suspended or not at that time or whether it was a jail sentence which was suspended. You were also convicted of conspiracy originally." (A-39)

This conviction, however, had been reversed on appeal because secured in violation of Yarmosh's constitutional rights. People v. Yarmosh, 11 N.Y.2d 397, 230 N.Y.S.2d 185 (1962). In Yarmosh, the court held that evidence offered at Yarmosh's trial had been seized in violation of the Fourth and Fourteenth Amendments of the United States Constitution. Under Mapp v Ohio, 367 U.S. 643 (1960), the evidence should have been excluded at

trial. Since it was not, the court reversed Yarmosh's conviction:

> "Since all the convictions were based on this illegally seized evidence, they must all be reversed and the information dismissed." People v. Yarmosh, supra, 11 N.Y.2d at 401.

Thus, Judge Weinfeld not only relied on a reversed conviction in imposing sentence, he also relied on one obtained in violation of constitutional rights. The latter practice was specifically prohibited in United States v. Tucker, 404 U.S. 443 (1972). In Tucker, the Supreme Court vacated a sentence, where the sentencing judge adverted at sentencing to convictions obtained in violation of the defendant's right to counsel. The court stated:

> "As in Townsend v. Burke, 334 U.S. 736, ...'this prisoner was sentenced on the basis of assumptions concerning his criminal record which were materially untrue.' Id., at 741. . . . The record in this present case makes evident that the sentencing judge gave specific consideration to the respondent's previous convictions before imposing sentence upon him. Yet it is now clear that two of those convictions were wholly unconstitutional under Gideon v. Wainwright, 372 U.S. 335. . . ." United States v. Tucker, supra, 404 U.S. at 446.

It is interesting to note that many of Yarmosh's co-defendants - unlike Yarmosh - had past convictions for bookmaking and bookmaking-related offenses. Where many defendants are sentenced at once, a substantial danger exists, and existed here, that facts pertaining to the acts of wrongdoing or criminal records of only some defendants may also be erroneously applied to others.

If the resentencing of Yarmosh is ordered, it should take place before a judge other than Judge Weinfeld. The

guidelines set forth in United States v. Robin, Dkt. No. 76-1033, slip. op. 2591 (2d Cir., March 30, 1977) clearly dictate this result.

According to Robin, the factors to be considered in determining whether

> "further proceedings should be conducted before a different judge are (1) whether the original judge would reasonably be expected upon remand to have substantial difficulty in putting out of his or her mind previously-expressed views or findings determined to be erroneous or based on evidence that must be rejected, (2) whether reassignment is advisable to preserve the appearance of justice, and (3) whether reassignment would entail waste and duplication out of proportion to any gain in preserving the appearance of fairness." slip. op. at 2593. (Emphasis supplied)

The "firmness of the judge's earlier-expressed views" must be considered in determining whether he may "reasonably be expected to erase the earlier impressions from his or her mind. . ." slip. op. at 2594

It is unlikely that Judge Weinfeld could successfully erase from his mind his conclusion that John Yarmosh is "a chronic violator" of the laws against bookmaking. (A-39) The terms used by the Judge express the firmness of his belief. A new judge, with a fresh view of Yarmosh, and his largely sympathetic background, and a correct view of his criminal record, should conduct the resentencing.

Moreover, such a judge may be better able to give full consideration to modern correctional theory con-

cerning gambling offenses. It is this theory that suggests imprisonment be eliminated as punishment for gambling offenses. Morris and Hawkins, Letter to the President on Crime Control, University of Chicago Press (1977), p. 24. Morris and Hawkins state:

> "It is essential that the police, the courts, and the correctional agencies should give absolute priority to dealing with violent and predatory crimes." Morris and Hawkins, supra, at p. 13.
>
> "It is impossible to defend a situation in which, while violent crime increases and the fraction of it that we solve decreases, we annually set our police to arresting . . . gamblers. Half of all our arrests are for crimes without direct victims, crimes which bring no complainant to the station-house, no call to the police switchboard. We overload our criminal justice system to a degree that renders it grossly defective where we most need protection from violence and predation. . ." Id at p. 19 (Emphasis added)

We submit that in light of his criminal record, which consists only of non-bookmaking related convictions, all misdemeanors, Yarmosh merits such consideration.

CONCLUSION

For the foregoing reasons, we respectfully submit that:

1. The conviction of John Yarmosh should be reversed;

2, His presentence report should be made part of the record, and, if necessary, a hearing then be held to determine his criminal record;

3. His sentence should be vacated; and

4. If resentencing is ordered, it should take place before a judge other than Judge Weinfeld.

Dated: New York, New York
May 16, 1977

Respectfully submitted,

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RELEVANT STATUTES

(Title 18 U.S.C.)

§ 2518(8)(d)

Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under section 2518(7)(b) which is denied or the termination of the period of an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application, and such other parties to intercepted communications as the judge may determine in his discretion that is in the interest of justice, an inventory which shall include notice of --

(1) the fact of the entry of the order or the application;

(2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and

(3) the fact that during the period wire or oral communications were or were not intercepted.

The judge, upon the filing of a motion, may in his discretion make available to such person or his counsel for inspection such portions of the intercepted communications, applications and orders as the judge determines to be in the interest of justice. On an ex parte showing of good cause to a judge of competent jurisdiction the serving of the inventory required by this subsection may be postponed.

(10)(a) Any aggrieved person in any trial, hearing, or proceeding in or before any court, department, officer, agency, regulatory body, or other authority of the United States, a State, or a political subdivision thereof, may move to suppress the contents of any intercepted wire or oral communication, or evidence derived therefrom, on the grounds that --

(i) the communication was unlawfully intercepted;

(ii) the order of authorization or approval under which it was intercepted is insufficient on its face; or

(iii) the interception was not made in conformity with the order of authorization or approval.

Such motion shall be made before the trial, hearing, or proceeding unless there was no opportunity to make such motion or the person was not aware of the grounds of the motion. If the motion is granted, the contents of the intercepted wire or oral communication, or evidence derived therefrom, shall be treated as having been obtained in violation of this chapter. The judge, upon the filing of such motion by the aggrieved person, may in his discretion make available to the aggrieved person or his counsel for inspection such portions of the intercepted communication or evidence derived therefrom as the judge determines to be in the interests of justice.

(b) In addition to any other right to appeal, the United States shall have the right to appeal from an

order granting a motion to suppress made under paragraph (a) of this subsection, or the denial of an application for an order of approval, if the United States attorney shall certify to the judge or other official granting such motion or denying such application that the appeal is not taken for purposes of delay. Such appeal shall be taken within thirty days after the date the order was entered and shall be diligently prosecuted.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

----------x

UNITED STATES OF AMERICA, :

Plaintiff-Appellee, :

v. :

JOHN YARMOSH, et al., :

Defendants- Appellants. :

----------x

AFFIDAVIT OF SERVICE BY MAIL OF BRIEFS AND APPENDICES ON BEHALF OF DEFENDANT-APPELLANT JOHN YARMOSH

STATE OF NEW YORK)
: ss.
COUNTY OF NEW YORK)

BARBARA MAZZELLA, being duly sworn, deposes and says: deponent is not a party to the action, is over 18 years of age and resides at 1380 East 104th Street, Brooklyn, New York.

On May 15, 1977, deponent served two copies of a brief and one copy of Appendix on Behalf of Defendant-Appellant John Yarmosh upon each of the following:

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the addresses designated by said attorneys for that purpose by depositing true copies of same enclosed in post-paid properly addressed wrappers in an official depository under the exclusive care and custody of the United States Postal Service within the State of New York.

Barbara Mazzella
Barbara Mazzella

Sworn to before me this
16th day of May, 1977

Shirley Watson
Notary Public

SHIRLEY WATSON
NOTARY PUBLIC, State of New York
No. 03-4610142
Qualified in Bronx County
Commission Expires March 30, 1979

3 copies received
5/16 Mel D Ags